## QUESTIONS PRESENTED

1. Whether the Constitution requires, in a trial for capital murder where the court grants the defendant's request that the jury be permitted to consider a verdict of guilt of the lesser included noncapital offense of murder, that the jury also be allowed to consider the lesser included offenses of involuntary manslaughter and criminally negligent homicide.

2. Whether the prosecution rebutted Tompkins' claim under *Batson v. Kentucky*, 476 U.S. 79 (1986).

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No. 87-6405

**IN THE**
**UNITED STATES SUPREME COURT**
**OCTOBER TERM, 1988**

**PHILLIP D. TOMPKINS,**
***Petitioner,***

**v.**

**THE STATE OF TEXAS,**
***Respondent.***

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**On Writ Of Certiorari**
**to the Texas Court Of Criminal Appeals**

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# RESPONDENT'S BRIEF

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief.

## OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is included in the Joint Appendix, hereinafter "J.A.," at pages 56-102. *Tompkins v. State,* ___ S.W. 2d___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987). Tompkins' motion for leave to file motion for rehearing was denied without written order. The trial court's findings on Tompkins' *Batson* claim also are contained in the Joint Appendix (J.A. 47-49).

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[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Tompkins."

## JURISDICTION

Tompkins seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tompkins bases his claims on the fifth, eighth and fourteenth amendments to the United States Constitution. Also involved herein are Sections 6.03, 19.02, 19.03, 19.05 and 19.07 of the Texas Penal Code, which are attached to Petitioner's Brief as an Appendix.

## STATEMENT OF THE CASE

### A. *Course of Proceedings and Disposition Below*

On January 30, 1981, Tompkins was indicted for the capital murder of Mary D. Berry. The indictment alleged that on or about January 26, 1981, Tompkins killed Berry while in the course of committing and attempting to commit the offenses of robbery and kidnapping of Berry. Tompkins pled not guilty and was tried by a jury, which, on June 11, 1981, found him guilty as charged. On June 15, 1981, following a separate hearing on punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071, and thereafter the trial court assessed punishment of death. During the pendency of Tompkins' appeal, this Court delivered its opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), and the Court of Criminal Appeals remanded for a hearing at which the state was required to explain its use of peremptory strikes to exclude black venire members. The *Batson* hearing was held on June 3 and 4, 1987, and on June 11, 1987, the trial court entered



findings of fact and conclusions of law in which it found that the state had refuted Tompkins' *Batson* claim. On October 7, 1987, the Court of Criminal Appeals affirmed the conviction. *Tompkins v. State*, ___S.W. 2d___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987). On May 16, 1988, this Court granted Tompkins' petition for writ of certiorari.

### B. *Statement of Facts*

#### 1. Instructions on Lesser Included Offenses

The state's case against Tompkins, although based entirely on circumstantial evidence, was formidable. At the guilt-innocence phase of trial, the state adduced testimony from fifty-nine witnesses and introduced more than two hundred exhibits to prove that Tompkins had committed the offense of capital murder as alleged in the indictment. Tompkins did not testify or introduce any evidence.

The state's evidence showed that Mary D. Berry, a 24-year-old pharmacist at Hermann Hospital in Houston, Texas left work at approximately 11:00 p.m. on January 25, 1981 (R. XVIII 28).[2] At 12:30 a.m. a policeman found Berry's car abandoned at a Houston intersection with its lights on and its engine running (R. XVIII 59).

At 1:30 a.m. on January 26, 1981, Johnny Davis, a night clean-up man at the Fondren Southwest Bank in Houston, saw Tompkins drive up to the bank in a

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[2]"R." refers to the record in the court below, the volume referenced by Roman numeral and the page by Arabic number. "B.H." refers to the transcript of the *Batson* hearing. "A." refers to the Appendix attached to this brief.

maroon Chevrolet Monte Carlo automobile, operate the automatic teller machine and place money from the machine in his pockets (R. XVIII 93-99). After Tompkins left the bank, Davis found a receipt for $1,000 on the top of the automatic teller machine (R. XVIII 100).

The audit tape in the teller machine showed that Berry's bank card was used to withdraw $1,000 at 1:30 a.m. on January 26, 1981 (R. XIX 69-75). A camera attached to the automatic teller machine photographed Tompkins using the machine at 1:30 a.m. on that date (R. XIX 65-66). The times of the photographs matched the times on the audit tape when Berry's card was used to withdraw $1,000 from the machine (R. XVIII 129-31, R. XIX 64-65).

Berry's body was found the next morning bound, gagged and tied to a tree (R. XX 77, 110-115; R. XXII 6). Her ankles had been tied together and to the tree with a bedsheet and part of an electrical cord (R. XX 124), and her hands were tied together and "very securely tied" to her neck by another piece of sheet material (R. XX 125, 127). A gag of the same bedsheet material was shoved in her mouth and wrapped around it (R. XX 123, R. XX 6-7). Berry died of suffocation (R. XXII 26). Her mouth remained open when the gag was removed because it had been in that position when rigor mortis set in due to the gag being "stuffed deep into the mouth into the posterior pharynx, which is the back-most part of the mouth opening" (R. XXII 7). Berry's tongue was pushed deep into the posterior pharynx (R. XXII 20), and there was bloody fluid exuding from her ear channels due to her eardrums having popped as she suffocated (R. XXII 9). In addition, her lips were discolored due to the pressure of the gag against them (R. XXII 12), there was a pale line around her neck due to the pressure of the strip of shirt



tied around her neck (R. XXII 9, 13), and there was extensive hemorrhaging into the whites of her eyes due to asphyxiation (*id*). When asked how much of the sheet had been put into Berry's mouth, the medical examiner replied, "As much as was possible to push in there" (R. XXII 31).

Tompkins was arrested in Austin, Texas on January 28 near his car (R. XX 145-55), a maroon Monte Carlo (R. XX 183). A search of the car produced a brown wallet containing two drivers' licenses, one belonging to Tompkins and one to Berry (R. XXII 72). In the wallet was Berry's "Quicksilver" bank card and several of her credit cards (R. XXII 73). The search of the automobile also produced a watch and chain and a purse and calculator belonging to Berry (R. XXII 71, R. XXIII 20-21). A tape recorder was found in the trunk of the car with a cord that had been severed (R. XXII 77). A laboratory analysis matched the severed cord of the tape recorder with the electrical cord that had been used to bind Berry's ankles (R. XXII 136), Tompkins' fingerprints were found on Berry's "Quicksilver" card (R. XXII 159-60).

Tompkins requested that the jury be instructed on the lesser included offenses of murder (J.A. 26-27), involuntary manslaughter (J.A. 28) and criminally negligent homicide (J.A. 29-30). The trial court denied the latter two requested charges but did instruct the jury on the lesser included offense of murder (J.A. 37). The court also instructed the jury that it could not find Tompkins guilty of capital murder unless it found beyond a reasonable doubt that he specifically intended to kill his victim (J.A. 36) and that any doubt as to whether he was guilty of capital murder or simple murder should be resolved by finding him not guilty of the former and guilty of the latter (J.A. 37) In closing argument, defense counsel offered the jury two

inconsistent theories: that Tompkins was not guilty of any offense (R. XXIV 8, 14, 17-14, 34-35, 37, 42) or that he was guilty of the less serious crime of murder (R. XXIV 39, 47-48).

### 2. State's Use of Peremptory Challenges

One of the venire members which the state excluded by use of a peremptory challenge was Leroy Green. The court asked preliminary questions of Green (R. XVI 94-97). The prosecutor then explained the elements of the offense of capital murder (R. XVI 98-100), following which she questioned Green as to his views on the death penalty. Although Green had told the court that he had no objection to the death penalty, he equivocated when questioned by the prosecutor.

> Now, you know that you were asked about your feelings on the death penalty, and I believe you indicated to her that you had no objection to it; is that correct?
>
> A Yes, ma'am.
>
> Q Have you always felt that way?
>
> A Well, I don't know. I guess so. But then, again, it's like you said: Sometimes I felt that way and sometimes I didn't.

(A. 1; R. XVI 100-01). When the prosecutor asked whether, in an appropriate case, Green could apply the law of causation, he said, "I believe I might have a little trouble with that." (A. 3; R. XVI 109). When she asked whether Green would require her to show premeditation in order to find the defendant guilty, he replied, "I don't think so." (A. 9; R. XVI 115).



At the *Batson* hearing, the prosecutor testified that she used a peremptory challenge to exclude Green because he had "flip flopped throughout the years" in his views on the death penalty and "had no strong feelings one way or the other" (A. 11; B.H. 209); because he often answered her questions by nodding his head or giving one-word responses (*id.*), which indicated that "he was not a very articulate person or didn't have any explanations or feelings that he was sharing with me" (A. 11; B.H. 210); because he had difficulty understanding the law of causation and premeditation and "flip flopped" in his responses to questions on those issues (A. 11-12; B.H. 210-11) and because, when she asked him about the second special issue on punishment, "his facial expressions were one of puzzlement or uncomfortable or hostility or something that indicated to me that he was in disagreement about it . . . " (A. 13; B.H. 211-12).

The trial court made the following findings regarding the state's exclusion of Green:

> Mr. Green testified that over the years he had frequently changed his opinion on the propriety of the death penalty and that his wife was opposed to the death penalty; he frequently made non verbal answers or "yeahs"; there was no valid communication between the prosecutor and the juror. The juror had problems with and vascillated [sic] regarding his ability to follow the law of causation and indicated that he might require evidence of premeditation.
>
> The State's excusal of Mr. Green was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

(J.A. 49).

The state also used a peremptory challenge to exclude venire member Isabella Thomas. Following some preliminary questions by the court (R. XI 49-51), the prosecutor conducted his voir dire of Thomas. He questioned her about reasonable doubt (R. XI 52-53), the elements of the offense of capital murder (R. XI 53-56), the range of punishment for the lesser included offense of murder (R. XI 55), the requirement of proving intent as well as the law governing criminal responsibility for the acts of another (R. XI 56-59), the fact that the state need not prove motive (R. XI 60-61), the privilege against self-incrimination (R. XI 61-62), the presumption of innocence (R. XI 63) and the special issues at the punishment phase of trial (R. XI 64-72).

The prosecutor then questioned Thomas at some length regarding the law of circumstantial evidence. When asked whether she could find a defendant guilty of capital murder based solely on circumstantial evidence, Thomas replied "I don't think so." (A. 15; R. XI 73). When the court rephrased the question for Thomas, she responded as follows:

> Be all circumstantial, but it would be enough to prove, to convince me beyond a reasonable doubt? Okay, I am good at doing things when it comes straight out, but I don't know about the circumstantial.

(*Id.*). When asked whether she would require the state to produce an eyewitness before she could find a defendant guilty of capital murder, Thomas replied as follows:

> I don't know. Not possible. But I guess it would be kind of - I don't know - it would be



> kind of hard for me - I don't know. Kind of got me on that one.

(A. 16; R. XI 74).

At the *Batson* hearing, the prosecutor testified that he struck Thomas because she had problems with the law of circumstantial evidence (A. 21-24; B.H. 106-09).

The trial court made the following findings regarding the state's exclusion of Thomas:

> Mrs. Thomas at first said she could not follow the law on circumstantial evidence that was in effect at the time of the voir dire and upon which the State relied for a conviction, and though she later indicated she could follow that law if so instructed by the Court, the prosecutor was skeptical about her ability to do so.
>
> The State's excusal of Mrs. Thomas was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

(J.A. 48).

The state also used a peremptory challenge to exclude venire member Frank E. Samuel. The court asked Samuel some preliminary questions (R. XVI 12-15), following which the prosecutor questioned him. When asked whether he could apply the law of causation in a capital murder case, Samuel replied, "Can I apply? Can I apply?" (A. 28; R. XVI 19). The prosecutor then rephrased the question and Samuel made no verbal response but instead answered by nodding his head; the prosecutor again rephrased the

question, to which Samuel replied, "I think so." (A. 28; R. XVI 20). Later, when asked whether he could apply the law of parties, Samuel said, "I think I would." (A. 30; R. XVI 23).

At the *Batson* hearing, the prosecutor testified that he struck Samuel because he was marginally literate and was not, in the prosecutor's estimation, able to grasp the issues which were involved in the case (A. 36-37; B.H. 137-39).

The trial court made the following findings regarding the state's exclusion of Samuel:

> Mr. Samuel, though not illiterate, could not satisfactorily fill out juror information sheets and questionnaires, and obviously had extreme difficulty with legal concepts. The prosecutor felt that he would have great difficulty in understanding the complexities of a capital case. Although less time was spent questioning Mr. Samuel than on some other jurors, it was obvious that that was motivated by what was perceived as Mr. Samuel's inability to understand and comprehend the issues, and not on the fact that he was black.
>
> The State's excusal of Mr. Samuel was neutral, relative, clear and legitimate as required by BATSON and was not racially motivated.

(J.A. 48-49).

## SUMMARY OF ARGUMENT

The opinion of the court below is fully consistent with this Court's holding in *Beck v. Alabama*, 447 U.S. 625 (1980). The trial court instructed the jury on the lesser included offense of murder, thus satisfying *Beck's* requirement that the jury be given a "third option" to either acquitting the defendant or finding him guilty of capital murder. Because the jury was afforded this third option, which it rejected, the court was not required to instruct on the other lesser offenses of involuntary manslaughter and criminally negligent homicide.

In addition, this Court should defer to the construction of Texas law made by the court below in holding that Tompkins was not entitled to his requested instructions. Even should the Court undertake to second-guess the state court's interpretation of its own law, Tompkins is not entitled to relief because there was no evidence in the record to support the instructions. The court below infringed on no constitutionally protected right by requiring that the record contain evidence to support *Beck* instructions on lesser offenses. Inasmuch as there was no such evidence, and defense counsel argued inconsistent defensive theories by suggesting more than one set of inferences which the jury might have drawn from the state's evidence, there was no factual dispute as to any of the elements of capital murder so as to warrant the instructions in question.

There is no merit to Tompkins' assertion that the prosecutors excused black venire members on the basis of race. In order to properly resolve Tompkins' claim under *Batson v. Kentucky*, 476 U.S. 79 (1980), this Court should examine the prosecutors' stated reasons for their peremptory challenge as well as the findings of the trial court, because many of the findings of the court of appeals are unsupported by the record and at odds with the reasons advanced by the prosecutors, which the trial court credited. None of the prosecutors' peremptory challenges was based, even in part, on the

race of the venire members, and there is nothing in the record to show that their stated reasons were false or pretextual. *A fortiori*, the state successfully rebutted Tompkins' prima facie case under *Batson*.

## ARGUMENT

### I.
### THE TRIAL COURT COMPLIED WITH *BECK V. ALABAMA* BY INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF MURDER.

#### A. *Tompkins was not entitled, as a matter of federal constitutional law, to his requested instructions on two lesser included offenses.*

In *Beck v. Alabama*, 447 U.S. 625 (1980), the Court invalidated a provision of the Alabama death penalty statute that precluded the jury from being instructed on a lesser included noncapital offense. *Beck* rested on the proposition that when "the defendant is guilty of a serious, violent offense--but leaves some doubt with respect to an element that would justify conviction of a capital offense--the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637.

In the case at bar, Tompkins requested that the jury be instructed on the lesser included offenses of murder (J.A. 26-27), involuntary manslaughter (J.A. 28) and criminally negligent homicide (J.A. 29-30). The court instructed the jury on the lesser included offense of murder (J.A. 37) but refused Tompkins' other two requested charges. Thus, consistent with *Beck*, the court afforded the jury a "third option" to either acquitting Tompkins or finding him guilty of a capital



offense. Tompkins received exactly that for which he asked, and the instruction which the court gave satisfied the *Beck* Court's concern that failure to instruct on lesser included offenses "interjects irrelevant considerations into the fact-finding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642.

Tompkins argues that even though the court instructed the jury on the offense of murder, it nonetheless was required by *Beck* to charge on the other, less serious offenses (Pet. Brief 23). *Beck* does not so hold, but instead left open this question. *Id.* at 630 n.5. As the court below noted, the two offenses in question--involuntary manslaughter and criminally negligent homicide--are lesser included offenses of capital murder only in the sense that they are included within the lesser offense of simple murder, on which the jury was instructed:

> Criminally negligent homicide may be a lesser included offense of involuntary manslaughter, which may be a lesser included offense of murder, which may be a lesser included offense of capital murder.

(J.A. 85). If Tompkins had been charged with only murder rather than capital murder, he would have had no constitutional entitlement to the requested instructions, even had there been evidence to support them.[3] That he was in fact charged with a capital

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[3]A majority of the circuits adhere to the rule that an instruction on a lesser included offense is not a matter of constitutional right in a non-capital case. *See, e.g., Alexander v. McCotter*, 775 F.2d 595, 601 (5th Cir. 1985); *Nichols v. Gagnon*, 710 F.2d 1267, 1269 (7th Cir. 1983), *cert. denied*, 466 U.S. 942

*(footnote continued on next page)*

offense should not lead to a different result, given that the jury was in fact afforded the "third option" mandated by *Beck*.

### B. *Tompkins was not entitled, as a matter of state law, to the requested instructions.*

#### 1. This Court should defer to the court of appeals' interpretation of state law.

It is settled beyond peradventure that violations of state law do not, standing alone, implicate the Constitution, and that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimensions." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). *See also Mabry v. Klimas*, 448 U.S. 444, 447 (1980) (construction of state statute "plainly a matter for the state courts to decide. . . ."). The court of appeals below found, as a matter of state law, that the evidence did not sufficiently raise the issues of involuntary manslaughter and criminally negligent homicide so as to require that the jury be instructed as to those offenses. As discussed, *infra,* at 15-20, the Texas court's interpretation of its own law is correct, analytically sound and devoid of any constitutional implications. This Court should refuse to second-guess this construction of state law given by the highest

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*(footnote continued from previous page)*
(1984); *Miller v. Stagner*, 757 F.2d 988, 993 (9th Cir. 1984), *cert. denied,* 475 U.S. 1048 (1986); *Chavez v. Kerby,* 848 F.2d 1101, 1103 (l0th Cir. 1988). *Cf. Prather v. Rees*, 822 F.2d 1418, 1423 (6th Cir. 1987). The *Beck* Court found it unnecessary to address this question. *Beck*, 447 U.S. at 638 n.14. *See also Holloway v. Florida*, 449 U.S. 905 (1980) (BLACKMUN, J., dissenting to denial of certiorari).



Texas criminal court. *See, e.g., Valles v. Lynaugh,* 835 F.2d 126, 127-28 (5th Cir. 1988); *Hill v. Kemp*, 833 F.2d 927, 929 (llth Cir. 1987) (federal court must defer to state court's decision whether defendant was entitled to lesser included offense instruction).

#### 2. There is no evidence to support the requested jury instructions.

Tompkins complains because the court below rejected his claim on the ground that there was no evidence in the record which supported the requested instructions. According to Tompkins, "*Beck* does not require a defendant in a capital case to testify or present evidence in order to obtain [such] instructions . . . " (Pet. Brief 16). Again, Tompkins misreads *Beck*, a case in which there was affirmative evidence, including the defendant's own testimony, to support the requested jury instructions, to which the defendant would have been entitled but for Alabama's preclusion clause. *Cf. Hopper v. Evans*, 456 U.S. 605 (1982) (instruction on lesser included offense not required where not raised by the evidence).

This Court has not delineated exactly what type or quantum of evidence is required to support a *Beck* instruction on a lesser offense. Guidance to the correct answer to this question may be found, however, in many of the courts of appeals' explications of *Sansone v. United States,* 380 U.S. 343 (1965), which requires that lesser included instructions be given in federal prosecutions. The better view is that such instructions must be given only where the defendant actually presents evidence which creates a factual conflict. As the Second Circuit cogently explained in *United States v. Busic*, 592 F.2d 13 (2d Cir. 1978):

> [A] defendant is entitled to a lesser-offense charge only where there is some rational

> basis for such a charge and "the evidence justifies it." Thus a defendant is not entitled to a lesser-offense charge merely because he formally contests elements of the greater charge which distinguish it from the lesser. The contest must be real. He must produce enough evidence to justify a reasonable juror in concluding that he committed the lesser offense but did not commit the greater offense.

*Id.* at 24. *Accord, United States v. Echeverri-Jaramillo*, 777 F.2d 933 (4th Cir. 1985), *cert. denied*, ____U.S.___, 106 S. Ct. 1237 (1986); *Fitzgerald v. United States*. 719 F.2d 1069, 1071-72 (10th Cir. 1983); *United States v. Harvey*, 701 F.2d 800, 807 (9th Cir. 1983); *Government of Virgin Islands v. Carmona*, 422 F.2d 95, 101 (3rd Cir. 1970).[4]

Here, there was *no* evidence in the record which might have supported Tompkins' requested instructions. Tompkins does not assert to the contrary, but instead suggests that the instructions were required because of the different inferences the jury might have drawn from the state's evidence (Pet. Brief 16-22). This argument should be rejected for two reasons. First, because there rarely are eyewitnesses to capital

[4]There is Second Circuit dicta to the effect that conflicting inferences from undisputed evidence may support a *Sansone* charge. *United States v. Garcia-Duarte*, 718 F.2d 42, 47-48 (2nd Cir. 1983). The rule in the First and Seventh Circuits is that such instructions are required if the issue is raised by a conflict in the evidence or if the lesser included offense might fairly be inferred from the uncontradicted evidence. *United States v. Leifer*, 778 F.2d 1236, 1246 (7th Cir. 1986); *Driscoll v. United States*, 356 F.2d 324, 326-28 (1st Cir. 1966). The Fifth Circuit has held, in a capital case, that a conflicting inferences may warrant such an instruction. *Cordova v. Lynaugh*, 838 F.2d 764, 769 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2832 (1988).



murders, such cases usually are based on circumstantial evidence, absent a confession, as was this one. If the Court accepts Tompkins' suggested rule--that the possibility of conflicting inferences from uncontradicted testimony creates a *Beck* issue--the result will be that in circumstantial cases the trial courts will be required to charge on every conceivable form of homicide regardless whether the defendant adduces any evidence. The irrationality of this standard is well illustrated by the case at bar, in which Tompkins argues that a jury might have considered his barbaric acts to constitute an offense no more serious than criminally negligent homicide, a Class A misdemeanor with a maximum punishment of a $2,000 fine and a year in jail. Tex. Penal Code Ann. §§ 19.07(b), 12.21. Such a result would truly "so pervert the law as to be ludicrous." *United States v. Collins*, 690 F.2d 431, 438 (5th Cir. 1982).

Second, as the instant case also well illustrates, such a rule would allow defendants to assert inconsistent defenses to their benefit and the unfair detriment of the state. Because Tompkins did not present any evidence to warrant the requested instructions, his only vehicle for suggesting which inferences he wished to have the jury draw was the closing argument of counsel. Yet defense counsel also argued at length--in sharp conflict to Tompkins' theory of "guilty of some crime but not capital murder"--that Tompkins should be found not guilty because there was no evidence linking him to the crime (R. XXIV 8, 14, 17-24, 34-35, 37, 42). Thus, Tompkins' theory that he was guilty of some offense less than capital murder was only an alternative defense to his theory of "not guilty." Under these circumstances, it can hardly be said that there was a sharply contested dispute as to one of the elements of the greater offense so as to require the requested instructions on the lesser offenses. To hold

otherwise would serve not to enhance the reliability of the fact-finding process but rather to condone manipulation of the judicial system.

### 3. There is no constitutional infirmity in the analysis of the court of appeals.

Under Tompkins' view of Texas law, he necessarily was entitled to one or the other of the two instructions which the trial court refused:

> Either the jury was required to infer that petitioner was aware of the risk that his conduct created, as the court found in discussing criminal negligence, or it was required to infer that he was unaware of that risk, as the court appears to have assumed in discussing recklessness. If the jury was required to infer that petitioner was aware of the risk that his conduct created, then the jury could reasonably have concluded that he recklessly killed the deceased, and convicted him of involuntary manslaughter. If, on the other hand, the jury was required to infer that petitioner was unaware of the risk that his conduct created, then the jury could reasonably have inferred that he negligently killed the deceased, and convicted him of criminally negligent homicide. In either case, the evidence would support a verdict of guilty of a lesser included noncapital offense, and Beck required that the jury be instructed regarding that offense.

(Pet. Brief 20). Of course, the jury was not "required" to draw either inference. This is not a case, contrary to Tompkins' assertions, in which there was a rational



evidentiary basis for inferring that Berry's death was due to recklessness or negligence. As discussed, *supra*, at 4-5, the uncontradicted evidence showed that Tompkins stuffed his victim's mouth completely full, thus causing her eardrums to rupture and her eyeballs to turn red with blood as she asphyxiated. Absent affirmative evidence that Tompkins did not intend to kill Berry, no rational jury could have drawn the inferences which Tompkins argues were "required."

Similarly, there is no substance to Tompkins' argument that the holding of the court below somehow forced him to surrender one constitutional right to assert another. That a defendant's right to remain silent is not absolute should be clear from the Court's holdings in *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), and *Jenkins v. Anderson*, 447 U.S. 232, 235-38 (1980), that a defendant who asserts the privilege against self-incrimination may thereby suffer adverse consequences. As the Court stated in *Crampton v. Ohio, reported sub nom. McGautha v. California*, 402 U.S. 183 (1970):

> The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

*Id.* at 213 (citation omitted). *See also Harris v. New York*, 401 U.S. 222, 225-26 (1971) (defendant who testifies may be impeached with prior inconsistent statements which would otherwise be inadmissible).

The court below's insistence that Tompkins adduce evidence to support the requested instructions was a constitutionally permissible allocation of the burden of proof. In *Leland v. Oregon*, 343 U.S. 960 (1952), for example, the Court found no constitutional defect in a statute which required a defendant to prove his insanity beyond a reasonable doubt in order to obtain an acquittal. *Id.* at 797-99. Inasmuch as *Leland* approves such burden-shifting on an issue which could result in an acquittal, surely it was constitutionally permissible for the court of appeals to require Tompkins to adduce evidence in order to secure a jury instruction on lesser included offenses.

## II.

## THE STATE REBUTTED TOMPKINS' PRIMA FACIE CASE UNDER *BATSON* BY OFFERING NEUTRAL, NON-RACIAL REASONS FOR THE EXCLUSION OF BLACK VENIRE MEMBERS.

A criminal defendant who is a member of a racial minority is denied equal protection when the state, with the intent to purposefully discriminate against members of the defendant's race, exercises its peremptory challenges to remove members of that race from the petit jury. *Batson v. Kentucky*, 476 U.S. 79, ___, 106 S. Ct. 1712, 1718 (1986). A defendant who claims that he has been denied equal protection by the state's use of peremptory challenges bears the burden of proving that the prosecutor's challenges are attributable to a racially discriminatory purpose. *Id.* at ___, 106 S. Ct. at 1721, *citing Washington v. Davis*, 426 U.S. 229, 240 (1976), and *Whitus v. Georgia*, 385 U.S. 545, 550 (1967). Once the defendant establishes a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges, the burden shifts to the state to come forward with an



explanation for the exclusions which is both neutral and related to the particular case to be tried. *Id.* at ___, 106 S. Ct. at 1723. While a mere affirmation of good faith is insufficient, the prosecutor's explanation need not rise to the level justifying a challenge for cause. *Id.*

*Batson* thus places upon the trial court the duty to determine whether the state has engaged in purposeful discrimination. *Id* at ___, 106 S. Ct. at 1723-24. This determination, which is largely dependent upon the trial court's assessment of credibility of the person offering the explanation as well as the asserted reasons, is a factual finding entitled to great deference upon review. *Id.* at ___ n. 21, 106 S. Ct. at 1724 n. 21, *citing Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *see also Slappy v. State*, 522 So.2d 18, 22 (Fla.), *cert. denied*, ___ U.S. ___, 56 U.S.L.W. 3880 (June 28, 1988).

In the instant case, the trial court made findings of fact and conclusions of law in which it found that the explanations offered by the state for each of its five peremptory challenges to black venire members were neutral, legitimately related to the case to be tried and not racially motivated (J.A. 47-49). The trial court's determinations are in full accord with the evidence adduced at the *Batson* hearing.

While the Texas Court of Criminal Appeals purported to defer to the trial court's findings in denying Tompkins' challenge to the composition of the jury, that court in fact undertook to reassess the credibility of the witnesses' testimony and to redetermine the factual findings. The result is that the opinion of the Texas Court of Criminal Appeals, almost without exception, either misrepresents or overlooks the neutral explanations which were offered by the prosecution and credited by the trial court. While the

court of appeals did not reject or disapprove of any of the trial court's findings, it did not rely on them but instead drew its own inferences from the record as to the reasons for the prosecutors' exercise of their peremptory strikes. It is well established that the Court of Criminal Appeals is not a fact-finding court, as the court stated in its opinion in the case at bar (J.A. 65). Because the Court of Criminal Appeals is not a fact-finding court and because the factual bases it found to be the reasons for the prosecutor's exercise of their peremptory strikes are at odds with the record and the findings of the trial court, which heard the witnesses and observed their demeanor, the proper focus of this Court is on the findings of the trial court and not the erroneous and unsupported conjectures of the court of appeals.[5]

### A. *The state's reasons for exercising a peremptory challenge to exclude venire member Leroy Green were both racially neutral and related to legitimate trial considerations.*

The trial court found that the state exercised a peremptory challenge to venire member Green for the following reasons: (1) over the years he had frequently changed his opinion on the propriety of the death penalty and his wife opposed the death penalty; (2) his responses to questions during voir dire were frequently non-verbal or "yeahs;" (3) he vacillated regarding his ability to follow the law of causation; and (4) he indicated that he might require evidence of premeditation (J.A. 49). Each of these reasons is racially neutral and rationally related to the case to be tried.

[5]The state may defend the judgment of the court below on any ground which the law and record permit. *Smith v. Phillips*, 455 U.S. 209, 215 n. 6 (1982).



Moreover, the determinations of the trial court are fully supported by the evidence introduced at the *Batson* hearing and the voir dire of Green. The prosecutor testified at the *Batson* hearing that

> [d]uring the questioning [Green] indicated that he used to be opposed to the death penalty. Sometimes he is opposed and sometimes not, and he flip flopped throughout the years. He apparently had no strong feelings one way or the other, which was a concern to me. He also indicated his wife opposed the death penalty.

(A. 11; B.H. 209). The prosecutor was entitled to exercise a peremptory challenge based on her assessment that Green possibly harbored doubts about the death penalty which could interfere with his ability to impartially consider the state's case. *See Gray v. Mississippi*, ___ U.S. ___, 107 S. Ct. 2045, 2056 (1987) (prosecutors often use peremptory challenges to remove venire members who express a degree of hesitation against the death penalty). The determination that the prosecutor's assessment was both a racially neutral and relevant basis for a peremptory challenge is not undermined by the fact that Green's responses during voir dire did not indicate a level of bias against the death penalty sufficient to support a challenge for cause. *See Batson*, 476 U.S. at ___, 106 S. Ct. at 1723.

At the *Batson* hearing, the prosecutor also stated that Green's responses regarding the law of causation concerned her.

> When I got to the point in my voir dire about causation, that was on page 109 of the transcript, he indicated that quote, I believe I might have a little trouble with

> that, and at that point I believe the transcript shows that the Judge interceded and had a conversation with him explaining it a little further and in response to the Judge's explanation he flip flopped and decided that he wouldn't have a problem with it, so that was a concern to me because causation was one of the issues that we felt we would be touching on in this case.

(A. 11-12; B.H. 210).

The basis for the prosecutor's uncertainty about Green's ability to apply the law of causation is apparent in the record of the voir dire.

> Q. For instance, if the robber goes into that bank and he has the gun with no bullets but he is going to use it and threaten the person into giving him money and he goes up to the teller with that gun and points it at the teller and says, "this is a holdup; give me your money," and the security guard overhears the bank robbery and he pulls his gun and fires at the robber and he misses and hits an innocent person and kills that innocent person, the law says that the bank robber is the one who can be charged with capital murder of that innocent person, because, during the course of the bank robbery, another offense was committed. And the law says when you put something into motion, you are going to be responsible for the results. So even though the bank robber didn't shoot the innocent person, he can be found guilty of capital murder of that innocent bystander. That's what is called the law of causation.



> Now, in a proper case in a capital murder would you be able to use and follow the law of causation in finding a defendant guilty?
>
> A. I believe I might have a little trouble with that.
>
> Q. You might have trouble with it. Do you agree with the law of causation?
>
> . . .
> THE COURT: ... Mr. Green, what she is trying to find out is if the Court tells you thats what the law is in the Court's charge -- and believe me, it will be lots more complicated than the way she put it.
>
> Juror Green: It's kind of complicated.

(A. 2-3; R. XVI 108-09).

The state's case against Tompkins depended in large part on the issue of causation. The evidence demonstrated that Tompkins abducted the victim, took her bank-teller card after she gave him the code necessary for its use, and tied her to a tree. The victim suffocated to death after gagging on the cloth gag that had been crammed into her mouth. The jury was instructed as follows regarding the law of causation:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that:
>
> 1. A different offense was committed; or
>
> 2. A different person or property was injured, harmed or otherwise affected.

(J.A. 36).[6] The state necessarily sought a juror who was able to consider and willing to apply the law of causation. The prosecutor's hesitation regarding Green's ability to apply the law of causation constituted a reason for exercising the peremptory challenge which was both neutral and related to the case to be tried.

The prosecutor also explained that she had been concerned about whether Green would require the state to establish that Tompkins' acts were premeditated.

> When I got to the portion of my voir dire about premeditation on page 115 of the transcript, after I had given my explanation and examples and asked him if he would want me to show premeditation to him, he said I don't think so and then he said that's all I can say. I don't think so. I don't know and again the Judge interceded and explained it to him and committed him that he would not require me to show premeditation, so in my view he had flip flopped

[6]This portion of the jury charge mirrors the provisions of Tex. Penal Code § 6.04, which sets forth the law of causation.



> again on an answer to a question that was extremely important to our case.

(A. 12; B.H. 210-11). Again, the source of this concern is readily apparent in the record of the voir dire.

> Q. The law also says I don't have to prove to you there was any premeditation before an act was committed. I don't have to show that he sat and planned it for a couple of days before the offense was committed. Would you want me to show premeditation?
> A. I don't think so.
>
> Q. Now, I can understand when you don't think so, because you haven't heard any facts yet.
>
> A. That's all I can say: I don't think so. I don't know.

(A. 8-9; R. XVI 115-16). The prosecutor was entitled to exercise a peremptory challenge to exclude a venire member such as Green, whose responses indicated that he might improperly require the state to prove premeditation.

The prosecutor also stated that, as a consequence of the number of non-verbal or one-word responses which she got from Green, she "really didn't have a whole lot to base any evaluation on except to assume that he was not a very articulate person or didn't have any explanations or feelings that he was sharing with me" (A. 11; B.H. 210). A lack of responsiveness on the part of a venire member seriously hampers the prosecution's ability to assess that individual's qualifications for jury service, and thus constitutes a racially neutral reason for exclusion

which is related to the trial.[7] *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984) ("Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated voir dire calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible."); *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952) quoted in *Maggio v. Fulford*, 462 U.S. 111, 118 (1983) and *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). ("Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth....

[7]In a number of cases, the courts have found that similar explanations for the exercise of peremptory challenges to exclude minorities did not reflect purposeful discrimination. *See United States v. Vaccarro*, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, ___U.S. ___, 108 S.Ct. 295 (1987) (peremptory challenges based on profession and poor response during voir dire); *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (peremptory challenge to venire member who looked sullen and glared at prosecutor); *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987) (the record does not remotely suggest that the peremptory challenge was based on race when exercised because hostility in posture and demeanor led the prosecutor to believe that the venire member might respond negatively to the government); *United States v. Cartlidge*, 808 F.2d 1064 (5th Cir. 1987) (peremptory challenge was permissible when explained by the fact that the challenged venire member avoided eye contact and that two of the next three jurors were desirable); *Lockett v. State* 517 So.2d 1346 (Miss. 1987) (prosecutor's peremptory challenges to minority venire members found not to violate *Batson* when explanations were given that they were excluded because youth and education level indicated instabililty and because demeanor suggested that they were unstable, unconcerned and had no respect for proceedings).



How can we say the judge is wrong? We never saw the witnesses . . . . ").

The determination of the trial court that the prosecution's peremptory challenge to Green was not racially motivated was properly based on the four reasons stated by the prosecutor. Each reason offered by the prosecutor was racially neutral and related to the case to be tried. The trial court's determination is supported by the record of both the voir dire and the *Batson* hearing and is fully consistent with the letter and spirit of *Batson*.

Despite the trial court's findings, the Court of Criminal Appeals concluded that Green was "peremptorily struck solely, by the testimony of the prosecuting attorney who testified on this point, because he had been an employee of the United States Postal Service for some thirteen years, and not simply because he was black" (J.A. 70-71). The conclusion reached by the court of appeals is incomprehensible in light of the explanations of the prosecutor which were credited by the trial court and the prosecutor's repeated testimony that Green's employment was not the basis for his exclusion. (B.H. 214, 215-16, 218.).

Viewed in context, it is apparent that the prosecutor's statement that she had not had luck with postal employees was more in the nature of a parenthetical comment than an asserted reason for excluding Green. In finding that Green was excluded solely on the basis of his type of employment, the Court of Criminal Appeals ignored the reasons actually advanced by the prosecutor as well as the findings of the trial court.

### B. *The state's reason for exercising a peremptory challenge to exclude venire member Isabella Thomas was both racially neutral and related to legitimate trial considerations.*

The trial court found that venire member Thomas first stated that she could not follow the law of circumstantial evidence upon which the state relied for a conviction and although she later indicated that she would follow the law if so instructed by the court, the prosecutor used a peremptory challenge to exclude her because he was skeptical about her ability to follow the law. Based on this determination, the trial court again found that the challenge was "neutral, relative, clear and legitimate as required by *Batson*" (J.A. 48). The trial court's findings are fully supported by the record.

The prosecutor testified at the Batson hearing as follows:

> From the very beginning I thought very seriously about talking (sic) Isabella Thomas. I wanted her and she answered every question and I had a good feeling about her. ... I had a feeling from her answers [regarding the law of causation, the law of parties, reasonable doubt, the elements, conflict of testimony, motive] that I wanted this lady on my jury. Now, in fact, I went into the two questions, one and two, and I felt satisfied at that time and I think I must have left out the questions concerning circumstantial evidence because I came back and picked up and that's when we started having problems.



> Q. Why was the law of circumstantial evidence so important at that particular time?
>
> A. That was my whole case. We had no direct evidence. We had to connect Mr. Tompkins by circumstantial evidence, and when we put the work in we were able to follow each step that he took, but the person had to go along with circumstantial evidence and there are a lot of folks that if you don't have an eye witness they are not going to convict them.

(A. 20-21; B.H. 104, 105-06). The prosecutor's perception that Thomas had difficulty accepting the law of circumstantial evidence is readily apparent from the record of the voir dire (A. 15-16; R. XI 73-74).

Tompkins argues that the prosecutor's perception that Thomas might have trouble with the law of circumstantial evidence could not constitute a neutral explanation for the peremptory challenge because, as recognized by the Court of Criminal Appeals, at the time of the challenge Tompkins' confession had not been excluded. Given this state of the record, according to Tompkins, the prosecutor's explanation raised an inference of pretext, and the Court of Criminal Appeals erred in its determination that the law of circumstantial evidence remained relevant to the state's case even though the confession had not been suppressed.

This argument is without merit, for a number of reasons. First, Tompkins' argument relies on the erroneous assumption that a peremptory challenge cannot be determined to be racially neutral unless the prosecutor's reason for the challenge is articulated with such precision that it can be demonstrated upon

retrospective review to fully correspond with the record. As discussed *infra*, at 40-41, *Batson* requires only that the trial court assess the credibility of the neutral explanation asserted by the prosecutor in light of the facts and other relevant circumstances which the defendant argues show purposeful discrimination. Indeed, as stated above, *Batson* makes clear that the explanation for a peremptory challenge need not rise to the level necessary to justify a challenge for cause.

Even assuming *arguendo* that *Batson* imposes the exacting standard of review for which Tompkins argues, his claim nonetheless must fail. It is apparent from the record that both the state and the defense anticipated that the state's case would depend on circumstantial evidence. Throughout the lengthy voir dire, each side consistently questioned venire members regarding their ability to follow the law regarding circumstantial evidence.[8] That the prosecutor

[8]The following venire members were questioned regarding circumstantial evidence: Green (R. XV 117-18 (state)); Thomas (R. IX 72-77); Lawrie (R. VI 430-31 (state), 458 (defense)); Matuszewski (R. X 1271 (state)); Palmer (R. X 1307 (state), 1324 (defense)). Cowart (R. VII 96-97 (state)); Whitley (R. VII 174-75 (state)); Linn (R. VII 232-33 (state), 246-47 (defense)); Schmidt (R. VII 279-80 (state)); Wistert (R. VIII 316-19 (state), 342 (defense)); Morris (R. VIII 376-77 (state), 401-2 (defense)); Bitterman (R. VIII 508-9 (state)); Sumrall (R. VIII 572-73 (state)); Yetter (R. VIII 676-77 (state)); Darilek (R. X 781-82 (state)); Thacker (R. X 846-47 (state)); Desporte (R. X 898-99 (state), 920-21 (defense)); Sutphen (R. XI 969-70 (state)); Mayo (R. XI 1049-51 (state)) Hindelang (R. XI 1100-1 state)); Welborn (R. XII 1171-72 (state), 1186-88 (defense)); Turnbull (R. XIII 1351 (state)); Henry (R. XIII 1421-22 (state)); Vana (R. XIII 1459-60 (state), 1485-86 (defense)); Hollingsworth (R. XIII 1571-72 (state)); Prolaska (R. XIV 51-52 (state)); Gabel (R. XIV 118 (state)); Martin (R. XIV 153 (state)); Wright (R. XIV 200-01 (state), XV 10 (defense)); Miller (R. XV 50-51 (state)); Moore (R. XV 116-17 (state)); Carr (R. XV 165-66 (state), 195 (defense)); Lesiker (R. XV 223-24 (state)); Sutton (R. XV 2101-02 (state), 75 (defense)); Mick (R. XV 174-76 (state), 190-91 (defense)); Deming (R. XV 2261-63 (state)).



questioned both white and black venire members on the law of circumstantial evidence belies Tompkins' assertion that the prosecutor's stated reason for excluding Thomas was a pretext.

Moreover, the record demonstrates that the state's case against Tompkins was in fact based on circumstantial evidence regardless whether the confession was excluded. Even if the confession had been admitted into evidence, the state would have been forced to rely on circumstantial evidence to obtain a conviction. Nowhere in Tompkins' confession (J.A. 50-55) did he state that he intended to kill his victim. In order to prove Tompkins' murderous intent, as it was required to do to establish his guilt of the offense of capital murder, the state necessarily was forced to rely on circumstantial evidence.[9]

Further, and more important, it was reasonable for the prosecutor to anticipate that the confession might be suppressed at some point after the voir dire, as in fact happened. Under Texas law, the state is allowed to anticipate in voir dire the evidence as it might develop at trial and to qualify the jury on the law applicable to the various possible configurations. *DeMouchette v. State*, 731 S.W.2d 75, 81 (Tex. Crim. App. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 75 (1987). That is precisely what took place in the instant case.

[9]Prior to the Court of Criminal Appeals' decision in *Hankins v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1981), Texas law required a jury instruction on circumstantial evidence in cases where there was no direct evidence offered by the state. The relevant inquiry in this case is not whether such an instruction was required but whether the state's case was based, even in part, on circumstantial evidence, thus prompting the prosecutor's concern for selecting jurors who could convict on the basis of such evidence.

On April 13, 1981, the trial court held a hearing on Tompkins' motion to suppress the confession following which, on May 11, 1981, it denied the motion (R. VI 67). Tompkins' confession ultimately was suppressed on the basis of trial testimony elicited by the prosecution from a state's witness, Justice of the Peace Guy Herman. Judge Herman testified that during arraignment Tompkins requested an appointed attorney but that no attorney was appointed for him and no information regarding that request was given to the Houston Police Department (R. XXII 44-45). At the close of Judge Herman's testimony, the trial court held as follows:

> [I]n view of Judge Herman's testimony and in view of the Supreme Court's decision in *Edwards v. Arizona* returned on May 18, 1981, which is approximately a month after we had a *Jackson-Denno* hearing in this case, I will reverse my prior ruling regarding your *Jackson-Denno* hearing and the Motion to Suppress the written confession of the defendant is granted.

(R. XXII 56-57).

As the trial court noted, this Court's decision in *Edwards* was delivered on May 18, 1981, more than a month after the suppression hearing and one week after the trial court denied Tompkins' motion to suppress. The voir dire of Thomas took place on May 19, 1981, the day after *Edwards* was decided. While the prosecutor did not testify that he was aware of the *Edwards* decision at the time he questioned Thomas, he certainly was chargeable with the knowledge that the case was pending and that the issue before the *Edwards* Court might well be dispositive of Tompkins' motion to suppress. Thus, the prosecutor could reasonably have anticipated that defense counsel's



efforts to exclude the confession would not end with the pretrial hearing and that it might ultimately be suppressed at trial, as in fact happened.

### C. *The state's reasons for exercising a peremptory challenge to exclude venire member Frank E. Samuel were both racially neutral and related to legitimate trial considerations.*

Following the *Batson* hearing, the trial court found that the state's peremptory challenge to venire member Samuel was based on the prosecutor's perception that Samuel would have great difficulty in understanding the legal concepts underlying a capital case. (J.A. 48-49). The court concluded that "the state's excusal of Samuel was neutral, relative, clear and legitimate as required by *Batson* and not racially motivated" (*Id.* at 49).

The trial court's conclusions are in full accord with the testimony of the prosecutor at the *Batson* hearing.

> Then when you look at the long form, your age, for example, I don't know whether he was forty-eight or forty-nine. I must admit sometimes I have problems when it comes to my age and I have to use my fingers, but he didn't know the month. It was either the tenth or the twelfth month, and by the way he writes, to me indicated that he had a hard time writing. If you go to if he was married, he answered that he lived in Harris County, Texas for thirty years. City and state of previous residence, he puts his address, 4422 Montrose, so he doesn't really answer the question. Your occupaton--well,

I am not sure, but that's either filler of some part, but it's o-r-d-a- and f-i-l-l-e-r.

(A. 34; B.H. 135-36).

If you go to number 13, he seems like he had a problem spelling Houston. If you go to line 15, he says he was in the military service and when he spells Army it's A-m-r-y. I am not the greatest speller in the world, but I can spell Army. If you go to 16 where it says religious preference, I assume he was going to put Baptist, but couldn't spell it and just put B. From that--and it was my opinion that this particular case was a very complex case. It had complex issues, and the last thing I wanted to do was put someone on there that would have been uncomfortable or I felt could not at least read the jury charge and have at least the ability to understand it, and what was going on and especially the issues that were involved, after seeing this, I just felt that I didn't want this person on that jury and mainly I really questioned his comprehension and if you have a hard time reading or writing I am not too sure on a serious case like this that I would want that kind of person on there, and that was my thinking, rightfully or wrongly, and, in fact, when I asked him the question I really did think in all honesty that the man couldn't even read and I did ask him to read . . . but even in that respect I was going to strike the man because of those reasons. I just didn't feel he could comprehend the issues or that he could read the charge and I made my mind up from the very beginning--probably when I saw the questionnaire.



(A. 36-37; B.H. 137-38). On cross-examination, defense counsel questioned the prosecutor about the fact that the record revealed that Samuel was able to read the two punishment phase questions:

A. Yes, it appeared that way.

Q. And you could see here that--

A. He had trouble, as I recall, but he got through it.

Q. That is not reflected in the record?

A. No, there is no way you could reflect that in the record.

Q. And you have specific recollections--

A. Yeah, I think that to be the case.

(B.H. 141-42).

Samuel's responses during voir dire revealed an apparent lack of understanding of the prosecutor's questions regarding, for example, whether he would require the defendant to take the stand and whether he would require the prosecutor to prove motive (A. 31-32; R. XVI 23-25). Although the questions made it clear that the defendant was not required to take the stand and that the prosecutor was not required to prove motive, Samuel initially responded to each question affirmatively (A. 31, 32; R. XVI 23, 25). When the prosecutor explained to Samuel a second time the requirements of the law regarding these issues, Samuel changed his answers to no (A. 32, 33; R. XVI 25-26). In short, the record shows that Samuel did not readily understand the inquiries of the prosecutor and

appeared to base his answers on what he thought the prosecutor was expecting of him.

Tompkins has not satisfied his burden of demonstrating that the peremptory challenge to Samuel reflected purposeful discrimination on the part of the prosecutor. The records of both the *Batson* hearing and the voir dire reflect the basis for the prosecutor's concern about Samuel's ability to grasp necessary legal issues. Moreover, an evaluation of a venire member's ability to understand and apply legal issues may be conveyed by a number of factors which are not fully reflected in the voir dire such as facial expressions or hesitation in answering questions. *See, e.g., Patton v. Yount*, 467 U.S. at 1038 n.14; *United States v. Oregon Medical Society*, 343 U.S. at 339. The peremptory challenge to Samuel is not improper under *Batson* simply by virtue of the fact that it relied to a degree on the prosecutor's intuitive response to factors which are not fully reflected in the voir dire, *e.g.*, the ease with which Samuel read the punishment questions.

### D. *The trial court was not required to undertake a sua sponte review of the entire voir dire before determining whether the prosecutor's explanations for the peremptory strikes were neutral and related to the case to be tried.*

Under *Batson*, the trial court is required to make two distinct determinations. First, it must determine whether the defendant has demonstrated that the circumstances concerning the prosecutor's use of peremptory challenges establish a prima facie case of discrimination against minority venire members. Second, after the prosecutor has articulated a neutral reason which is related to the particular case, the trial court must determine "if the defendant has established



*purposeful discrimination*." *Batson*, 476 U.S. at ___, 106 S. Ct. at 1723-24 (emphasis added). With respect to this final determination, *Batson* mandates only that the court evaluate the credibility of the proffered explanation in light of the defendant's evidence of discriminatory exercise of peremptory challenges.[10]

#### 1. The court of appeals properly refused to consider matters which were not presented to the trial court.

In the retrospective *Batson* hearing, Tompkins made no attempt to introduce any evidence comparing minority venire members who were challenged with white venire members who were not challenged, evidence which he now claims demonstrates the pretextual nature of the prosecutors' explanations. By asking this Court and the court of appeals below to review the trial court's factual findings based on

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[10]The Sixth and Seventh Circuits have held that adversarial proceedings are not generally required for a valid *Batson* determination except where the trial court determines that fundamental fairness requires rebuttal and participation by the defendant in the "neutral explanation" phase of the proceeding. *United States v. Davis*, 809 F.2d 1194, 1201-02 (6th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 3234-35 (1987) (defendants not present at *in camera* proceeding to determine whether peremptory challenges were racially motivated); *accord, United States v. Tucker*, 836 F.2d 334 (7th Cir. 1987); *but see United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) (defendants entitled to in-court hearing except where compelling reasons militate against such procedure) and *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988) (same); *see also United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988) (defendant not entitled to examine prosecutor at *Batson* hearing) and *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988), *cert. pending*, ___ U.S. ___, No. 88-5159 (1988) (same).

evidence which was not presented to that court, Tompkins seeks to thwart the orderly administration of justice and flout settled principles of appellate review. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983) (Court will not decide questions not raised in or decided by the court below). In order for the data offered by Tompkins to have been properly before the state appellate court, it would have had to have been presented to the trial court.

### 2. The procedure urged by *amici* is in conflict with *Batson*.

Both *amicus* briefs argue that in the context of a retrospective *Batson* determination, as was held here, it is incumbent upon the trial court to review the record of the entire voir dire and trial before determining that the prosecutor's explanation is neutral and not a pretext for racial discrimination (ACLU Am.Br. 24; LCCR Am.Br. 12-13).[11] Specifically, it is urged that the trial court must conduct a comparative analysis of appropriate portions of the voir dire to determine whether "(a) minority venire members were stricken, while similarly situated white venire persons escaped challenge; (b) the voir dire of minority venire members appeared designed to elicit a particular response, and similar examination was not undertaken of white venire persons, (c) the challenged venire person was examined in a perfunctory manner, if at all; and (d) the explanation of the State was not logically related to the elements of the offense" (LCCR Am.Br. 12-13; *see also* ACLU Am.Br. 24).

[11]"ACLU Am.Br." refers to the amicus brief filed by the American Civil Liberties Union; "LCCR Am.Br." refers to the amicus brief of the Lawyers' Committee for Civil Rights under Law.



There is no support for the assertion that such an inquiry on the part of the trial court is constitutionally mandated by either the substantive considerations or the procedural guidelines articulating the burdens of proof and persuasion set forth in *Batson*. Further, the analysis and comparisons which *amici* assert must be undertaken by the trial court would reveal precisely those facts and circumstances which a defendant bears the burden of producing in establishing a prima facie case. In *Batson*, the Court set forth three factors which establish a prima facie case of purposeful discrimination in the selection of the petit jury and held that in determining the third factor, whether an inference had been raised that the prosecutor used peremptory challenges to exclude venire members from the jury on account of their race, "the trial court should consider all relevant circumstances." *Id.* at ___, 106 S. Ct. at 1723. The Court further set forth examples of circumstances which would raise the necessary inference. *Id.* To the extent *Batson* contemplates the sort of comparative analysis urged by *amici*, such would be appropriate only with regard to the initial inquiry whether a prima facie case has been established. Thereafter, the proper focus is on the reasonableness of the prosecutor's explanations in light of all the information then available.

In addition, the procedure urged by *amici* flies in the face of *Batson*, which contemplates that the prosecutor will state the reasons for his peremptory strikes contemporaneously with the voir dire. Here, the *Batson* hearing was held retroactively, some six years after trial. Now that *Batson* is the law of the land, such hearings necessarily are held during the course of voir dire, in which case the trial court does not have the benefit of a trial transcript in making its

determinations. Under these circumstances, the inquiry suggested by *amici* would require that voir dire be interrupted whenever a *Batson* issue is raised so that the court reporter could prepare a transcript in order that the trial court could conduct a comparative analysis. The Constitution does not mandate such a cumbersome procedure.

Finally, while the *Batson* Court declined to formulate particular procedures to be followed by the trial court for determining whether peremptory challenges are racially motivated, the procedure proposed by the *amici* is foreclosed by the Court's adoption of the burden of proof rules developed in the context of Title VII "disparate treatment" actions. *Batson*, 476 U.S. at ___ n. 18, 106 S.Ct. at 1721, *citing Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *see also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984). Under these rules the ultimate burden of persuasion lies with and never shifts from the defendant. Thus, the proposition set forth by the *amici*, that in effect imposes a duty on the trial court to assist the defendant in satisfying his burden of proof, is in direct conflict with *Batson*. *Batson* does not provide for further inquiries or proceedings after the state offers its neutral explanation. Even in those instances where the trial court believes that fundamental fairness requires that the defendant be given the opportunity to rebut the explanation, it is the burden of the defendant, not the trial court, to demonstrate that the explanation is a pretext for purposeful discrimination. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253 (should the defendant in a Title VII case carry his burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext



for discrimination); *State v. Antwine*, 743 S.W.2d 51, 64 (1988) (defendant has the obligation to demonstrate that the state's explanations are merely pretextual and, thus, not the true reason for the use of the state's peremptory challenges).[12]

### 3. Had the trial court made the comparison urged by Tompkins, his claim nonetheless would fail.

Underlying the claims asserted by Tompkins and the *amici* is the unproven assumption that the trial court did not undertake the review which they claim is constitutionally mandated. The only apparent support for this assumption is their apprehension that, had such review been undertaken, the peremptory challenges would have been found impermissible under *Batson*, and that because the trial court reached a different conclusion from that which they would have had it reach, it necessarily did not conduct the desired review. While the Constitution does not require the trial court to undertake the inquiries delineated by the *amici*, even were such inquiries constitutionally mandated, it is clear that the comparison evidence which Tompkins asserts would have been uncovered would

[12]The *amici* assert that, as a consequence of the reference to *Anderson v. Bessemer* City, 470 U.S. 564 (1985), in footnote 21 of the *Batson* opinion, *Batson* must be viewed as incorporating a "clearly erroneous" standard of review under which the Court of Appeals was required to review the entire record before deferring to the determinations of the trial court. Because the opinion of Texas Court of Criminal Appeals explicitly states that the entire voir dire was reviewed on appeal (J.A. 71), this assertion is without import. Moreover, as demonstrated *infra*, the determination of the trial court that the peremptory challenges were not racially motivated would be entitled to deference under either the "clearly erroneous" standard of review or the "rational basis" standard purportedly applied by the Court of Criminal Appeals.

not have demonstrated that the prosecutor's explanations were a pretext for purposeful discrimination.

Tompkins alleges that the prosecution's stated reason that he struck Isabella Thompson for her inability to apply the law of circumstantial evidence was mere pretext. For example, Tompkins calls attention to the fact that various venire members who were selected as jurors had experienced difficulty understanding certain points of law during the voir dire. While the jurors alluded to by Tompkins apparently had difficulty understanding some of the principles of law put to them, they also stated without reservation that they could in fact apply the law once it had been adequately explained. *E.g.*, Hollingsworth (R. XIII 1553); Wistert (R. VIII 314); Moore (R. XV 1910-11); Demming (R. XV 2263).

Thomas, on the other hand, had difficulties which went beyond a mere failure to fully grasp a legal concept. She was simply noncommital as to whether she could apply the law as she understood it and find a person guilty of capital murder in the absence of direct evidence. This hesitancy to apply standing law would understandably create doubt regarding a venireman's potential as a juror and was the critical factor which led to the prosecutor's decision to exclude Thomas, even though he initially had been predisposed to accepting her as a juror on the basis of her age and work experience (A. 20; B.H. 104). The record refutes the assertion that Thomas was as acceptable to the state as white venire members who were not excluded.

Finally, Tompkins argues that the prosecutor's reasons for striking Leroy Green are superficial but cites only a few of the several reasons enumerated by the prosecution culminating in its decision to excuse Green. As discussed, *supra*, at 22-29, the prosecutor



offered four separate considerations which led her to exclude Green. Green's voir dire indicated that he was less than a reliable juror, leading the prosecutor to find "it looks like from his answers or lack of answers that I wouldn't have wanted him." (A. 13; B.H. 212).

Though Tompkins alludes to petit jurors who may have shared a single commonality with Green, none of the accepted jurors proved to have as many attributes which were, from the prosecutor's perception, decisively negative. Those accepted jurors who may have responded nonverbally at one time or another, like Green, also demonstrated overriding qualities which might be viewed as desirable in potential jurors. *E.g.*, Carol Moore: as a mother of two children she has experience assessing truthfulness (R. XV 110-11); Sharon Miller: willing to forego beginning school for certification in order to fulfill duty as a juror; also, had been a victim of a crime on more than one occasion (R. XV 35-36, 66); William Wright: demonstrated no difficulty with legal principles or any inherent bias (R. XIV 1753-85); Katherine Yetter: followed each point of law without question or confusion and answered questions without reservation (R. IX 643-81); Curtis Sumrall: had been a victim of a crime and followed legal principles and answered questions without reservation (R. IX 575, 551-88); Denean Hollingsworth: demonstrated understanding of legal principles and willingness to follow the law objectively (R. XIII 538-79); Patricia Ahuero: her mother had been the victim of a crime and she had prior jury service (R. XVII 167, 168); Peggy Whitley: had been a victim of a crime (R. VII 188); Charles Vana: had prior jury experience (R. XIII 1476). Moreover, even though petit juror Sumrall's wife was a postal employee as were Green and his wife, the prosecutor made clear that Green's employment was, at the most, only a contributing factor in her decision to

exclude Green. Finally, none of the petit jurors cited by Tompkins as similar to Green shared his inconsistent attitude toward the death penalty, his inability to follow the law of causation or his difficulty with the concept of premeditation. The record clearly demonstrates that the prosecution had substantive, neutral cause for peremptorily striking Leroy Green.

### E. *The record refutes any assertion that the prosecutor's strikes were based even in part on considerations of race.*

#### 1. *Batson* forbids only peremptory challenges made solely on the basis of race.

The *amicus* Lawyer's Committee argues that the Texas Court of Criminal Appeals incorrectly interpreted *Batson* to sanction peremptory strikes that are in part racially motivated (LCCR Am.Br. 6-9). Because there is no evidence that the peremptory challenges were even in part racially motivated, this argument is of no import. Moreover, the insubstantiality of this argument is revealed by a comparison of *Batson* and the opinion of the court below, which reveals "practically identical" language, as *amicus* concedes (LCCR Am.Br. 7 n.2). *Amicus* finds fault with the conclusion of the court of appeals that no constitutional violation had occurred because the trial judge "found, implicitly, that the prosecuting attorneys did not exercise their peremptories against the five black venirepersons complained about solely on account of their race or on the assumption that black jurors as a group would be unable impartially to consider the state's case against appellant." (J.A. 62). The language of the court below is fully consistent with *Batson*, in which the Court stated:



> [T]he equal protection clause forbids ... the states to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection ... would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise *solely* from the juror's race."

*Batson*, 476 U.S. at ___ 106 S.Ct. at 1723 (emphasis added).

*Amicus* asserts that the conclusion that Batson requires totally non-racial explanations "is inescapable in light of this Court's repeated rejection of mixed-motive explanations in other contexts" (LCCR Am.Br. 8). *Amicus*' reliance on *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), is misplaced. The Court in *Arlington Heights* merely held that the judicial deference which normally precludes judicial scrutiny of legislative or administrative acts is no longer justified when there is *proof* of a discriminatory purpose. *Id.* at 265; *see also Washington v. Davis*, 426 U.S. 229, 243 (1976) (legitimate purposes behind challenged actions are not open to impeachment by evidence that they were actually racially motivated). Here, the record is devoid of proof of discriminatory intent.

#### 2. There is no evidence of a prosecutorial policy to exclude minority venire members.

Any assertion that the Harris County District Attorney's Office had a formal practice of excluding venire members on the basis of race was clearly refuted by former district attorney Robert Moen, who testified *on Tompkins' behalf* during the *Batson* hearing. When

asked about the existence of such a "policy," Moen responded:

> Let me clear up something first of all, if I can, and that is that policy is not my word because I really want to say that I served under Carol Vance and Johnny Holmes and I am stating for the record at no time have either one of those District Attorneys of Harris County, Texas ever had such a policy and stated such a policy for all the members of the District Attorney's Office to follow.

(B.H. 34). That it was neither the policy nor practice of Harris County prosecutors to exclude blacks as a matter of course is further demonstrated by Moen's unimpeached testimony that in about half of the capital cases he had tried the juries were composed of both black and white members, with as many as three or four blacks on a given jury (B.H. 20-22). Moen acknowledged that he would look at the race of the venire members on the general information sheet, but that his selection decision "would depend, obviously, on your individual questions and listening to the individual questioning of the defense" (B.H. 28-29). Race was merely a factor which would enter his decision-making process (B.H. 33).

Moen further testified that considerations of race in jury selection during his tenure as a prosecutor stemmed from a particular incident of racial tension which took place in Harris County in the early 1970's and contributed to poor relations between the police and the minority community. According to Moen, this situation was not as acute in 1981 (B.H. 35). Thus, contrary to *amicus*' assertions, the record demonstrates that there never has been such a policy in the Harris County District Attorney's Office. *Compare Batson*,



476 U.S. at ___ & n.3, 106 S. Ct. at 1727 & n.3 (MARSHALL, J., concurring) (instruction book allegedly used by Dallas County, Texas District Attorney's Office explicitly advised prosecutors to exclude minority members). Because there is absolutely no evidence that such a policy existed in Harris County, and, thus, no proof of discriminatory intent, this is not a case in which the Court should give less than full deference to the testimony of the prosecutor and the findings of the trial court.

In conclusion, this is not a case in which there can be any doubt as to the motivation for the prosecution's exercise of peremptory challenges. The findings of the trial court, which are firmly grounded in the record, refute any notion that the challenges were made on the basis of the venire members' race or ethnic origin. *Batson* does not require that the explanations for peremptory challenges be sufficient to support a challenge for cause--only that they be rational and based on considerations other than race. In any event, regardless of the standard the Court employs, the record in the case at bar simply does not bear out Tompkins' factual assertions. There was no violation of *Batson*.

## CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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## APPENDIX A

### Relevant Portions of Voir Dire of Leroy Green

Now, you know that you were asked about your feelings on the death penalty, and I believe you indicated to her that you had no objection to it; is that correct?

A Yes, ma'am.

Q Have you always felt that way?

A Well, I don't know. I guess so. But then, again, it's like you said: Sometimes I felt that way and sometimes I didn't.

Q Have you ever had any discussions with other people about the death penalty?

A No.

Q Is this something you just thought about yourself?

A (Juror nods heads.)

Q Does your wife have any feelings about the death penalty, that you know of?

A I don't think she favors it too much.

Q So she would be against the death penalty; is that correct?

A In the conversations that I have heard her stated, I think.

Q But you don't feel that way?

A (Juror shakes head.)

Q Would it bother you to any extent to be a juror that renders a guilty verdict in a capitol murder case and participate in the punishment portion, knowing that your verdict in the punishment phase would require the Judge, or the Court, to assess the death penalty?

A You say: Would it bother me to participate?

Q Yes sir.

A I don't know if it'd bother me to participate. I don't know if it bothered me if I assess it. I haven't been through that thing; so I can't say what I would feel afterward.

(R. XVI 100-02).

* * * * *

Q For instance, if the robber goes into the bank and he has the gun with no bullets but he is going to use it and threaten the person into giving him the money and he goes up to the teller with that gun and points it at the teller and says, "This is a holdup; give me you money," and the security guard overhears the bank robbery and he pulls his gun and fires at the robber and he misses and hits an innocent person and kills that innocent person, the law says that the bank robber is the one



who can be charged with capital murder of that innocent person, because during the course of the bank robbery, another offense was committed. And the law says when you put something into motion, you are going to be responsible for the results. So even though the bank robber didn't shoot the innocent person, he can be charged with capital murder and found guilty of capital murder of that innocent bystander. That's what is called the law of causation.

Now, in a proper case--in a capital murder--would you be able to use and follow the law of causation in finding a defendant guilty?

A I believe I might have a little trouble with that.

Q You might have some trouble with it. Do you agree with the law of causation?

MR. JONES: I object to the question. It isn't whether he agrees; whether he can follow the law.

THE COURT: Sustained.

Mr. Green, what she is trying to find out is if the Court tells you that's what the law is in the Court's charge-- and believe me, it will be lots more complicated than the way she put it.

THE COURT: It is kind of complicated. But you could follow that if the Court told you that was what the law was?

JUROR GREEN: I could follow it.

THE COURT: Down the line you might want to take that into consideration when you are trying to deal with the fellow, but the law supplies that in getting from here to there. It says if you do something that is illegal, to begin with, then you are responsible for whatever else happens as a result of what you did, the idea being that if that fellow hadn't gone in in the first place, nothing would have happened.

JUROR GREEN: I understand.

THE COURT: Fine.

QUESTIONS BY MRS. DAVENPORT:

Q The law also furnishes us with what is known as the law of parties.

A Repeat?

Q The law of parties. That is when, say, at least two people went in that bank together and planned that bank robbery and one of them was going to be the one standing there holding the gun and the other one scooping up the money. Okay. They have already done that and they are trying to make their getaway. And the one with the gun turns around and shoots somebody that he thinks is going to try to stop them, and they make their getaway. And there is another person out in the car who was just driving the car, waiting for these two that went in the bank and came



out. The law says under the law of parties the man who did the shootings and the man who did the scooping up of the money and the man who drove the car can all three be charged with capital murder and found guilty of capital murder. Now, in a proper capital murder case, would you be able to follow and apply the law of parties?

A Yeah.

Q The burden of proof that the State must meet in a criminal case is called beyond a reasonable doubt. Now, we say "beyond a reasonable doubt." And I wish I could give you a definition for that, but lawyers haven't all agreed on it; so we don't have a definition. It's the definition of what you put on what that means. I submit to you that it does not mean we have to prove it to you beyond all doubt. We don't have to convince you one hundred percent, because I doubt if I could convince you of anything one hundred percent. You would always think in the back of your mind somewhere or "maybe" or "I'm not quite sure about this," but that doesn't mean I haven't proved it to you beyond a reasonable doubt. The law presumes there is going to be some doubt because you have to base your verdict on what witnesses testify to up here on the stand. And when you hear from more than one person, you have two or more people testifying about the same thing, you are going to hear some conflicts in the testimony, because people don't see things the same or remember details the same.

So you have to listen to the testimony and try to decide who is telling the truth and who you can believe and how much you can believe. So can you see that there is going to be some doubt when you get through hearing from all the witnesses?

A (Juror nods head.)

Q The law says I must prove to you beyond a reasonable doubt each one of these elements back here in the indictment. Now, if you have some doubt about what he was wearing or something like that, then the law says that doesn't matter, you can just discard that. What I have to prove to you: that he was committing robbery or kidnapping and murder on a certain date in Harris County, Texas. The law also says that my burden does not increase with the severity of the crime; so just because we are talking about capital murder doesn't mean my burden of proof to you is any greater than if we were talking about a marijuana case or a traffic ticket. It's still beyond a reasonable doubt. And the only kind of guideline I can give you is just to use your common sense. Do you have any questions about "reasonable doubt"?

A No.

Q Would you hold me to any greater burden than beyond a reasonable doubt?

A (Juror shakes head.)



THE COURT: Mr. Green, because she has to take down everything all of us say, if you just shake your head and she happens not to be looking, then she misses it.

Q Now, the defendant has certain constitutional rights to protect him when he comes into a courtroom. One of those rights says that he is presumed to be innocent until the State has proved him guilty beyond a reasonable doubt. Now, this is a presumption of innocence. But my question to you is: Can you afford him that presumption right now without hearing any of the evidence or any of the testimony in this case? Would you presume right now that he is innocent as he is sitting there?

A Yeah.

Q Another one of his rights is that he doesn't have to take the stand and testify if he doesn't want to. And I can't call him to testify. I don't have that right. But after the State puts on their case and we bring you the witnesses that we can bring you and you hear all of our evidence, if he doesn't want to testify, if you believe the evidence we brought you, would you be able to find him guilty?

A Yes, if I believed.

Q Yes, sir. If we put on our case and you weren't convinced beyond a reasonable doubt that he is not guilty--

THE COURT: Double negative in there.

QUESTIONS BY MRS. DAVENPORT:

Q If we don't prove to you that he is guilty and you haven't heard from him, would you want to hear his side of the evidence before you found him not guilty?

A Not necessarily.

Q The law says we don't have to prove to you a person's motive. I don't have to prove to you why Phillip Tompkins would have done what we charged he had done, because I can't prove someone's motive. That's an impossible burden on us: to try to prove to you why a person did something. We can show you he did so intentionally; but we can't tell you why, because often a person doesn't even know why he did a particular thing. Would you want me to prove motive to you so much that you wouldn't be able to find a person guilty without knowing why he did something?

A No.

Q The law also says I don't have to prove to you there was any premeditation before an act was committed. I don't have to show that he sat and planned it for a couple of days before the offense was committed. Would you want me to show you any type of premeditation?



A I don't think so.

Q Now, I can understand when you don't think so, because you haven't heard any facts yet.

A That's all I can say: I don't think so. I don't know.

THE COURT: What she is getting at, Mr. Green, is although it is completely normal to say "I don't think" or "I believe so," everybody says that. In courtrooms it makes lawyers nervous. And what she is trying to ask you to do is to give her a yes or no answer. That's all that she was trying to ask for there.

QUESTIONS BY MRS. DAVENPORT:

Q So would that be a yes or no?

THE COURT: Run the question by him again.

A I think I am nervous.

THE COURT: I imagine you are. If you weren't nervous, Mr. Green, you would be the first person that ever sat on that chair that wasn't nervous.

A Would you repeat?

QUESTIONS BY MRS. DAVENPORT:

Q Would you require me to show you some premeditation on his part before you could find him guilty?

A No.

Q Thank you.

(R. XVI 108-17).

**Prosecutor's Reason for Peremptory Strike of Leroy Green**

Q You were the one who actually conducted the examination of that particular venireman. Is that right?

A Yes.

Q And would you please tell the Court the reasons--your reasons for not wanting that particular juror or that venireman?

A Okay, may I preface that by saying having read Mr. Green's transcript, which is basically my transcript, because I did a heck of a lot more talking than he did, I could tell from questions I asked and answers that I got why I would not want him on the jury, and from reviewing that, actually from remembering what Leroy Green looks like, but as I went through this and from his jury information card and the page that he filled out, I noticed that he had two years of college but had worked for thirteen and a half years as a messenger for the U.S. Postal Service which, if nothing else, in his favor or against him, is kind of an alert to me, because I have not had very good luck with postal employees and in his answer on voir dire it would indicate to me he



would not make a good juror. I noticed his wife also worked for the Post Office and I had that circled on that juror card. During the questioning, he indicated he used to be opposed to the death penalty. Sometimes he is opposed and sometimes not, and he flip flopped throughout the years. He apparently has no strong feelings one way or the other, which was a concern to me. He also indicated his wife opposed the death penalty, and as I went through the questions I asked him prefaced by examples and explanations that were quite lengthy, the report indicates that I got two nods as answers, indicating he was shaking his head up and down. The record also indicates that I got three shakes of the head indicating a no answer. He answered yeah three different times. He answered I guess once and he answered uh-huh twice, which indicates to me that I was not getting very good responses from him in answer to my questions, so based upon those eleven different answers with either shakes, nods, yeah, I guess or uh-huh, I really didn't have a whole lot to base any evaluation on except to assume that he was not a very articulate person or didn't have any explanations or feelings that he was sharing with me. When I got to the point in my voir dire about causation, that was on page 109 of the transcript, he indicated that quote, I believe I might have a little trouble with that, and at that point I believe the transcript shows that the Judge interceded and had a conversation with him explaining it a

little further and in response to the Judge's explanation he flip flopped and decided that he wouldn't have a problem with it, so that was a concern to me because causation was one of the issues that we felt we would be touching on in this case. When I got to the portion of my voir dire about premeditation on page 115 of the transcript, after I had given my explanation and examples and asked him if he would want me to show premeditation to him, he said I don't think so and then he said that's all I can say. I don't think so. I don't know, and again the Judge interceded and explained it to him and committed him that he would not require me to show premeditation, so in my view he had flip flopped again on an answer to a question that was extremely important to our case. Another problem, from reviewing the transcript on page 124, when I was trying to find out how he felt about probability--a definition of probability in the punishment questions, and after I gave him definitions and examples and I asked him how he would define probability, he answered: I really don't know, so at that point I felt like I didn't have a very deep thinking person or someone who was very interested enough to even come up with a definition, and on page 125 of the transcript when I was explaining a continuing threat to society and I had gone through my explanation and examples of what that would be and I asked him--before I even asked him the question it states in the transcript that I said: is there anything about question



number two that is bothering you? I believe if you check them all, I didn't normally ask that. Before I even asked him the question, which indicated to me that either his response--his facial expressions were one of puzzlement or uncomfortable or hostility or something that indicated to me that he was in disagreement about it and then I went on to ask the question and I think it's when I was asking him about his feelings about police officers, since he had indicated he had a friend named Deputy McDuffy, that I did not finish that line of questioning. Of course, the record doesn't indicate any pause or time in there before Mr. Royce moved to strike that juror, but I'm sure that we must have had a conversation about it or talked bout it as we did about each juror before we made a decision on whether to move for a strike or to pass them to the defense to let them voir dire. I don't remember what was said during that conversation, but it looks like from his answers or lack of answers that I wouldn't have wanted him. Even just reading a cold record, I wouldn't have wanted him on the jury, and I am sure Mr. Royce, who was sitting there watching him and listening to his answers, felt the same way.

Q Did you all move to strike this juror simply because he was black?

A No, sir.

MR. PEREZ: I will pass the witness, Your Honor.

(B.H. 208-12).

**Relevant Portions of Voir Dire of Isabella Thomas**

Q Okay. Good enough. There are two types of evidence in a criminal case: Direct and circumstantial. Let's say direct. Let's say someone comes up to you and beats you over the head and I see that and I'm called to testify in your behalf and I testify as to what happened. "Oh, Mr. Dove came up to you and beat you over the head and took your purse." That's what we call an example of direct evidence. Someone saw that person commit the crime against you.

Now, we have what we call circumstantial evidence; that is, we don't have direct evidence. We don't have no eye witnesses that say the crime. We must accumulate the facts and come to a reasonable conclusion that whoever is charged committed that crime.

Someone breaks into your house, no one saw them break in and no one saw them leave, but that person is caught either with your car or your property a couple of days later or maybe an hour later. From that set of facts, one could conclude, from taking all the facts together even though no one saw that person break in or leave your house, that that person that burglarized your house, broke into it, and stole your property, you see what I am saying.



A I understand.

Q My question to you is in the proper case can you apply the law of circumstantial evidence in a capital murder case? Can you find someone guilty of capital murder based on what we call -- you know, we have got to put a label on everything -- not direct evidence, but circumstantial evidence.

A I don't think so.

THE COURT: Let's see that we understand each other, like what we are talking about here. Of course, that circumstantial evidence has got to prove to you that it happened beyond a reasonable doubt, because if they didn't prove it to you that it happened beyond a reasonable doubt, then you would have to find the fellow not guilty; understand what I am getting at here?

THE VENIREMEN: Be all circumstantial, but it would be enough to prove, to convince me beyond a reasonable doubt? Okay, I am good at doing things when it comes straight out, but I don't know about the circumstantial.

THE COURT: Well, that's kind of one of those things - we are not trying to change your mind about something, but it's one of those things these lawyers are entitled to know, and you are the only person that can tell us that. I can't guess what is in your mind. It's kind of like if your kid comes in and he has got cookie

crumbs all over his face, you heard a crash and you found the cookie jar on the floor. You pretty well know he has been eating the cookies, but that is all circumstantial evidence. Nobody saw him get into the cookie jar.

THE VENIREMEN: I would understand that and that I would understand. I don't know.

MR. ROYCE: May I ask another question?

THE COURT: Yes sir, you may.

Q (Mr. Royce) Will you agree with me that capital murder is probably the most or is the most severe crime that one can commit in our society.

A Yes, it is.

Q Before you could find someone guilty of capital murder, in order for you to do so, would you have to have an eye witness to the crime yourself, before you could render that verdict of guilty? Would you require the State to prove or bring forth an eye witness, someone who actually saw the crime.

A I don't know. Not possible. But I guess it would be kind of -- I don't know -- it would be kind of hard for me -- I don't know. Kind of got me on that one.

THE COURT: Mrs. Thomas, I don't want to put the heavy on you. It's kind of



one of those things that he has got to have an answer to. Remember when we started I gave you a possession or someone charged with marijuana. I think we have talked to so many people that we loose tract of ourselves.

Let me give you an example: If someone is charged with possession of marijuana and they smoked a joint, so to speak, and they are going to be tried for it, and someone is asked, can you follow the law of possession of marijuana -- I know it is a simple example. Someone asked can you follow the law of possession of marijuana and I say no because -- I just don't like it. I think maybe marijuana should be made legal -- I just don't like that law. It doesn't mean I am not a law abiding citizen, or can't follow the law, but my principals are such that I don't like it and I couldn't apply the law to the facts regardless of what was shown to me. I changed my mind and then evidence is presented and the person is shown beyond a reasonable doubt that he did possess marijuana and I know it. The evidence shows it. But because my feelings are such, whether religious or moral or something deep down inside, I couldn't apply that law to the facts and I find the person not guilty or I can't make a decision because of my beliefs.

Q (Mr. Royce) There's nothing wrong with saying yes or no to any of these questions. It's just that we must put you in a position where we get a yes or no answer, and I

know it's difficult. And like the judge has said, only you know your true feelings; I don't. And you can't go in and say one minute yes and one minute no and it's difficult I know, because no one warned you that you were going to be subjected to the type of questions that we have asked you. And it's difficult for anybody, especially if you haven't had time to think it through and unfortunately, we don't have a lot of time. And so when I ask, you know, in a proper case would you require the State to bring you an eye witness and bring to you and say "yeah, I saw him do it", before you could enter a verdict of guilty.

A Well, I know it's not possible to bring an eye witness to the cases that come up. So you have to use whatever evidences that you have and prove it to the best of your ability.

Q That's right. My question to you, can you use or apply circumstantial evidence or the fact that you don't have any eye witness or you don't have any direct testimony? Can you apply that and arrive at whether or not a person is guilty or not guilty? Can you sit in judgment of another human being by applying and finding him guilty if it is proven to you beyond a reasonable doubt. Can you apply that law?

A I don't think so.

THE COURT: Mrs. Thomas. I don't think so, ain't going to do it, because I



guarantee you in a few minutes Mr. Jones over there is going to be asking you about the same thing from the other side of the coin. And nobody is trying to make you decide one way or another. I mean, we don't care, which way you decide. We have got to make you decide it, but we don't care which way you decide.

THE VENIREMEN: Well, this is my first time coming to jury duty.

THE COURT: We realize that. We realize that this is a different sort of thing. Somebody out of a clear blue sky and what he is asking you, it is this simple: If he proves his case to you beyond a reasonable doubt. Could you find the defendant guilty in any case based on circumstantial evidence or would you always require direct evidence before you could find somebody guilty.

THE VENIREMEN: I am sure if I was shown all of the possibilities of beyond a reasonable doubt, I could.

Q (Mr. Royce) I guess we use terms and then you use terms and we all get confused. Is that when you say, I only have one burden. I don't have a bunch of burdens. I have one that I must prove each and every element in that offense. You see what I am getting at is that if you got a speeding ticket, it's my burden to prove to you the elements that would be in that particular charge, what charged him with the crime. I must show you the date that it happened

on, the jurisdiction -- in our case robbery. I must prove either/or the kidnapping and the intent to cause death.

Now, one of the tools so to speak in doing that, the law of circumstantial evidence. And you are saying that you can apply that law to a given set of facts.

A Yes I could.

(R. XI 72-78).

**Prosecutor's Reason for Peremptory Strike of Isabella Thomas**

A From the very beginning I thought very seriously about taking Isabella Thomas. I wanted her and she answered every question and I had a good feeling about her. I mean I thought we related well to her. She was forty-five years of age, She had worked -- she was employed as a head cashier at Watson Center. As it turned out, she had been robbed a couple of times. She had worked there for twelve years. Before that she was employed with a private home for five years. I remember that I liked this lady. To me there was some credibility to her. The questions and the answers she gave I liked. She wasn't highly educated. To me that didn't make any difference at all. It's that I thought she had enough years on her that she would not tolerate what Mr. Tompkins did under any circumstances and I felt that she could give the death penalty. Now, I was concerned over certain areas of our



laws. One was the law of causation, and I felt that she could follow the law of causation. The law of parties, she could follow the law of parties, and I sincerely believe she could do so if called upon and I went through the whole thing -- beyond a reasonable doubt, the elements that, if we missed one -- if we didn't develop one what she could do and things of that nature. The conflicts of testimony. I went through motive and she answered, in my opinion -- she gave me what I wanted, and I had a feeling from her answers that I wanted this lady on my jury. Now, in fact, I went into the two questions, one and two, and I felt satisfied at that time and I think I must have left out the questions concerning circumstantial evidence because I came back and picked up and that's when we started having some problems.

Q (By Mr. Perez) Why was the law of circumstantial evidence so important at that particular time?

A That was my whole case. We had no direct evidence. We had to connect Mr. Tompkins by circumstantial evidence, and when we put the work in we were able to follow each step that he took, but the person had to go along with circumstantial evidence and there are a lot of folks that if you don't have an eye witness they are not going to convict them. That's just the way they think, and there is nothing wrong with it, and I had to make sure that this lady could follow that particular law and that was my case. It was one of circum-

stantial evidence, and so when we got down to asking her that -- and I think very honestly she answered the questions the best she could and, if I might, on page 1006 I asked her: my question to you is, in the proper case, can you apply the law of circumstantial evidence in a capital murder case? Can you find someone guilty of capital murder based on what we call -- you know, we have got to put a label on everything -- not direct evidence, but circumstantial evidence, and the Court said: if he proved it to you beyond a reasonable doubt, Mrs. Thomas. Her reply was: I don't think so. The Court said: let's see that we understand each other. Like what we talked about there, that circumstantial evidence has got to prove to you that it happened beyond a reasonable doubt because if they didn't prove it to you, then you would have to find the fella not guilty. Do you understand what I am getting at there? The prospective juror, Mrs. Thomas, said it's all circumstances, but it was enough to convince me beyond a reasonable doubt. I can do those things, when it comes straight out, but don't know about the circumstantial. On page 1007, the Court said: well -- excuse me 1006, line 23, the Court said: well, that's kind of one of those things. We are not trying to change your mind about something, but it's one of those things these lawyers are entitled to know and you are the only person that can tell us on that. I can't guess what is in your mind. It's kind of like if your kid came in and he has got cookie crumbs all over his face and you



heard a crash and you found a cookie jar on the floor. You pretty well know he ate the cookies. That's circumstantial evidence. No one saw him get into that jar. The juror said: I understand that and that I would understand. I don't know. On the same page, 1007, line 21, she replies again: I don't know. I could, but I guess it would be kind of -- I don't know. It would be hard for me -- I don't know kind of got me on that one. And we are still talking about circumstantial. The question in response to that was whether or not she would require the State to come forth with an eye witness, and at that time I really became -- you know you start trying to decide well, should you take a chance, because she had responded properly to everything else, and I still at that time maybe still wanted her. I did not move to strike her for cause and I guess I just had not made up my mind at that time, and on page 1009, line 18, I say: my question to you, can you use or apply circumstantial evidence or the fact that you don't have an eye witness or you don't have any direct testimony, can you apply that and arrive at whether or not a person is guilty or not guilty? Can you sit in judgment of another human being by applying and finding him guilty if it is proven to you beyond a reasonable doubt? Can you apply that law, and her answer was: I don't think so, and really from those responses -- and I don't think I ever moved to strike her for cause. I struck her as a peremptory. I may have begun, but I don't think I did. The way I questioned her after that as far as would

it be an inconvenience as far as coming here and missing work and things of that nature, I may have still was toying in my mind whether or not to take her, and at the conclusion I felt it was just too big of a risk. My strikes were in a good position and I was in good shape and that time was not the time to take any risks, so I struck her.

Q The main reason you struck her then was she could not follow the law on circumstantial evidence?

A She had problems in that regard, yeah.

Q Did you strike her because she was a black person?

A No.

Q Would you have stricken her even if she was a white person?

A Yes, sir.

(B.H. 104-10).

**Relevant Portions of Voir Dire of Frank E. Samuel**

Q Good morning. As the Judge said, we have several questions to ask you. A lot of it is concerning certain applications of our laws; whether or not you can apply a law in a certain fact situation; whether or not you believe in that law; and, again, whether or not you sit on a jury and apply



the law to the facts that you hear from the witness stand.

One of the laws that we will be going over is the law of causatation. The law of causation is a law that I anticipate the Judge--

MR. DOWELL: We object to voir dire on 6.04.

Q (By Mr. Royce) --might give to you. In explaining the law of causation, let me first go through the piece of paper that charges Mr. Tompkins, this man right here, with the offense of capital murder.

It alleges certain elements, certain things, that we must prove to you beyond a reasonable doubt. One of the things we must prove to you is the date that it happened; that on or about January 26, 1981, Mr. Tompkins committed capital murder. I must prove to you also where it happened, what jurisdiction; and I must prove just that it happened in Harris County, Texas. So the date, the Harris County, Texas--and then I must prove to you that the murder happened while in the course of committing or attempting to commit robbery. And I must prove to you, further, that during the course of that robbery, Mr. Tompkins had the intent to cause the death of Mary Berry, and I must prove to you what it means. Mary Berry died by suffocation, placing a cloth gag in her mouth. So I must prove to you the date, January 26, 1981; I must prove to

you that the crime happened in Harris County, Texas; and I must prove to you that Mr. Tompkins, while in the course of committing the offense of robbery, intentionally caused the death of Mary Berry; and I must prove to you by what means.

Intent-- if you notice, this piece of paper used the word "intent." Intent--I obviously can't open a man's mind up and say: Here it is. I can prove intent by either acts done or words spoken, by the witnesses that testify. Let's say that someone comes up to you and points a gun at you and says, "Give me your money" and shoots you and kills you and someone witnessed that particular transaction. Someone saw that. Well, one, if those facts were testified to in court, one could come to the conclusion that person had the intent to rob you and also had the intent to kill you by what those people observed. The guy came up to you and he said a certain thing and he said, "Give me your money" and he had a gun and pointed that gun at you and pulled trigger. With those facts, one could come to the conclusion that the person had the intent to commit capital murder -- or had the intent to commit murder. Now, sometimes the law furnishes intent for us. It does so by the law of causation. Now, the law of causation says if the person has the intent of committing one felony and during the course of that felony, another felony is committed, then we are going to hold him



responsible for that act, even though he never meant it.

Let me give you and example. A goes into a bank with the purpose of robbing that bank. He goes up to the teller and pulls a gun and says, "Give me your money." The security guard that works in that bank sees what's going on and he pulls-- that is, the security guard pulls -- his gun or fires at the robber but misses him and kills B, a person who was there to cash their check. Now, we know A can be charged with capital murder because he was in the course of committing robbery where someone got killed. Now, he didn't intend to kill that lady; in fact, he wasn't the one that shot her. But the law says that if one has intent to commit a felony, like he had the intent to commit that robbery--he went in there with that intent--and, during the course of that robbery, someone else got killed, even though he didn't mean to cause that injury, then the Court is going to hold him responsible; and he can be charged with capital murder, be found guilty of capital murder, and the death penalty could be assessed.

Now, the Judge said, if, for any reason, I don't explain myself to your satisfaction, please tell me.

Now, my question to you is: Can you apply the law of causation in a capital murder case, in a proper case?

A Can I apply? Can I apply?

Q Do you have any trouble with that law? The law of causation says that we are going to furnish the intent. We are going to hold you responsible for what you did but we are going to go a step further and hold you responsible for something you didn't do, because you start--it's like a snowball going down a mountain. That snowball accumulated more snow as it went down. And as a result of it--but for that person's action, that lady would not have been killed, you see.

A (Juror nods head.)

Q My question to you is: Can you find someone guilty of capital murder by applying the law of causation?

A I think so.

Q Now let's assume that we found someone guilty of capital murder. Capital murder is when someone, for our purposes,--while in the course of committing a robbery, he intentionally caused the death of somebody.

Let me give you another example. A guy goes into a U-Totem with the purpose of robbing the place. He does so and he takes the customers of that U-Totem and places them in a cooler and locks them up and ties them up and leaves them. Now let's say the air-conditioning cuts off for some reason and the people die. They



suffocate. Now, air can't come in. Now, he comes in and he says: Well, I intended to rob the place but I didn't intend to kill them; the cooler was cool, and they could have stayed in there for a week without any harm coming to them. People come in and out of that store. Someone would have found them. The law of causations says we are going to hold him responsible for those people's death, even though he didn't mean to kill them, and he can be charged with capital murder and be found guilty of capital murder and the death penalty assessed.

Now, let's assume we have found the person guilty of capital murder. We said you are guilty. What happens to him? Well, the Judge will submit two questions to you in deciding whether or not a person should be put to death. If you answer both questions yes--if all twelve jurors answer both questions yes--then the Judge will assess the death penalty. Those two questions are on the board. If you will, will you read Question No. 1 for us. It says "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another would result."

Q And Question No. 2?

A "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Q Question No. 1--you have found the person quilty of capital murder. All right. He has done it--what he is charged with. Through the law of causation--let's backtrack one second, if I may.

Another law that we have is the law of parties. The law of parties says if A and B go in the bank and they plan it--B's job is to take the money out--take the money out of the cash register. That's all; he doesn't have a gun. He doesn't mean to hurt anybody. A and B go into the bank. B goes up to the teller, takes the money, and leaves. A kills someone in the course of that robbery. Now, we know A can be charged with capital murder because he was in the course of committing that robbery and he caused someone's death. B. can also be charged with capital murder because the law of parties says if you help--if B helps in the commission of that robbery/murder, then we are going to find him just as guilty; you see? And he can be charged with capital murder.

Can you apply the law of parties? What I mean by "apply"--do you agree with the law of parties?

A I think I would.

Q We also have a law that a defendant has a right not to testify. He has a right not to put on any evidence whatsoever if he doesn't want to. Let's assume that I prove to you that that he is guilty and you find him guilty. Before you could find him



guilty, would you require him to take the stand and tell his side of the story?

A I think so.

Q Now, the law says that--

THE COURT: Let me interrupt, Mr. Royce.

Mr. Samuel, the law says that nobody has to testify in their own behalf, and they don't have to put any evidence on. The State has to prove them guilty. They don't ever have to take the stand unless they want to. And the jury can't require them to do so, just like the State can't make them take the stand. And the fact that somebody doesn't take the stand or doesn't put on any evidence--you can't use that as any evidence against him.

JUROR SAMUEL: (Juror nods heads.)

QUESTIONS BY MR. ROYCE:

Q Now, during your questioning there are no right or wrong answers. The whole purpose of my talking to you and these gentlemen talking to you is to determine how you feel concerning certain laws. Some of us just like capital murder--some of use can apply it, can give it, can assess--participate in assessing the death penalty on any case. They have no ill feelings about the death penalty. It's like you have stated. There are others that don't believe

in it, don't like it, and couldn't sit in judgment of another human being because of it. There are those that may believe in it but they don't want any part in it and they don't want to judge another person. That's why we are asking you, because we don't want you to go against a particular belief or conviction you might have. So after the explanation that the Judge gave to you, if I, say, prove to you that the person is guilty, would you require him--knowing the law says he doesn't have to take the stand; he doesn't have to put on any witnesses; but because of your conviction or your beliefs, would you require him to do so?

A No.

Q The law says I don't have to prove motive, the reason why someone went--let's say the reason was someone committed a crime. Let's take our bank robbery explanation. Why did he go in there? Just a mean old cuss or did he have a fight with his wife or did he need money for food or what prompted him to go in that bank? The law says I don't have to prove it to you. I don't have to prove why a person committed a crime. Would you require me to prove that to you?

A Would I require it?

Q Yes, sir, before you could find someone guilty.

A (Juror nods head.)



THE COURT: Now, Mr. Samuel, the law says he doesn't have to, because it pretty much is impossible to prove somebody did something. And the law says he doesn't have to prove why somebody did it; just that he did it.

Q (By Mr. Royce) Do you see? Would you make me prove the reason why before you could find someone guilty?

A Would I make--

Q Yes, sir.

A No.

(R. XVI 12-26).

**Prosecutor's Reason for Peremptory Strike of Frank E. Samuel**

Q Mr. Royce, directing your attention to Frank Samuel, would you please tell the Court the reasons for your striking Mr. Samuel?

A What I need is--well, first, we were provided with a short form data sheet and a long form data sheet. If you refer to the long form data sheet on Mr. Samuel--well, first, you have to read the short form. I don't have the short form.

THE COURT: I believe Mr. Dowell has it. Could I see it and we will mark it?

MR. DOWELL: It's in the record.

A Okay, if you look at the short form, to me, in my opinion, the short form is filled out-- it's mailed to the prospective jury person and it's filled out and it is sent back. Whoever filled this out was not Frank Samuel, and when I saw this and saw the long questionnaire form, I had a strong suspicion this man could not read and write and what keyed me was that someone else, in my opinion, definitely filled out the short form and he signed it, and in my estimation you can really tell the difference. Then when you look at the long form your age, for example, I didn't know whether he was forty-eight or forty-nine. I must admit sometimes I have problems when it comes to my age and I have to use my fingers, but he didn't know the month. It was either the tenth or twelfth month, and by the way he writes, to me indicated he had a hard time writing. If you go to if he was married, he answered that he lived in Harris County, Texas for thirty years. City and state of previous residence, he puts his address or some address, 4422 Montrose, so he doesn't really answer the question. Your occupation-- well, I an not sure, but I'm sure that's either filler of some part, but it's o-r-d-a- and f-i-l-l-e-r

MR. PEREZ: Judge, I don't know if this is necessary, but, for the record, can we have this marked as some kind of exhibit?



THE COURT: Yes, sir, you may, and the short form as well if you desire. You may have them marked.

(State's Exhibits 1 and 2 marked.)

MR. PEREZ: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q (By Mr. Perez) When you say the long form, are you referring to State's Exhibit 1?

A Yes, sir.

Q And the short form, you are referring to State's Exhibit 2?

A Yes, sir.

Q In fact, it's the upper third portion of State's Exhibit 2?

A That's right.

MR. PEREZ: Your Honor, the State is going to offer into evidence, for the purpose of this hearing, State's Exhibits 1 and 2

THE COURT: Any objection?

MR. DOWELL: No.

THE COURT: All right, State's Exhibits 1 and 2 are admitted. May I see at least State's Exhibit 1?

(State's Exhibits 1 and 2 admitted)

A Yes, ma'am, I have a copy of it. If you go to number 13, he seems like he had a problem spelling Houston. If you go to line 15, he says he was in the military service and when he spells' Army it's A-m-r-y. I am not the greatest speller in the world, but I can spell Army. If you go to 16 where it says religious preference, I assume he was going to put Baptist, but couldn't spell it and he just put B. From that and--it was my opinion that this particular case was a very complex case. It had complex issues, and the last thing I wanted to do was put someone on there that would have been uncomfortable or I felt could not at least read the jury charge and have at least the ability to understand it, and what was going on and especially the issues that were involved, after seeing this, I just felt that I didn't want this person on that jury and mainly I really questioned his comprehension and if you have a hard time reading or writing I am not too sure on a serious case like this that I would want that kind of person on there, and that was my thinking, rightfully or wrongly, and, in fact, when I asked him the question I really did think in all honesty that the man couldn't even read and I did ask him to read, I think, questions one and two, and to my surprise, he was able to read them, but even in that respect I was going to strike the man because of those



reasons. I just didn't feel he could comprehend the issues or that he could read the charge and I made my mind up from the very beginning--probably when I saw the questionnaire.

THE COURT: Let me interrupt you a second. On State's Exhibit 2 you have attached four pages of questionnaire. I presume you didn't intend to?

MR. PEREZ: No, Your Honor.

THE COURT: Only the first one applies to this venireman. I will remove it, gentlemen, with your consent, and give it back to you. It has nothing to do with this individual.

MR. DOWELL: Thank you.

MR PEREZ: Thank you, Your Honor.

THE COURT: Sure.

A And that was the reason.

Q (By Mr. Perez) Did you strike him, sir, because he was a black person?

A No.

Q Would you have done the same thing with a white person?

A Yes, sir.

(B.H. 134-39).